No. 7695

United States
Circuit Court of Appeals
For the Ninth Circuit

GUS B. GREENBAUM, CHARLES GREENBAUM and WILLIAM GREENBAUM,

Appellants,

vs.

UNITED STATES OF AMERICA,

Appellee.

Upon Appeal from the District Court of the United States for the District of Arizona

APPELLEE'S PETITION FOR A REHEARING

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BINE PRINTING CO.

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To the Honorable Curtis D. Wilbur, presiding Judge, and to the associate Judges of the United States Circuit Court of Appeals for the Ninth Circuit:

The United States of America, appellee in the above entitled action, hereby respectfully petitions the Court for a rehearing of this cause on the following grounds:

1. The Court erred in its discussion of the law and facts in connection with the representations alleged and proven to have been made by appellants to the effect that the stores operated and to be operated by the company would be under the guiding hand of Clarence Saunders.

2. The Court erred in confining the responsibility of appellants to representations in regard to the earning of profits and the payment of dividends and in stating that the prosecution relied solely upon such representations.

3. The Court erred in holding that the admission in evidence of accountant Null's summary was erroneous.

4. The Court erred in holding that the refusal to permit the extension of Brandt's cross-examination was erroneous.

5. The Court erred in holding that the introduction in evidence of Government's Exhibits ~~16~~ 189 and ~~17~~ 110 (income tax records) was prejudicial and reversible error.

I

In connection with the first ground for a rehearing, it is apparent that this phase of the case was not discussed with sufficient detail in the Government's briefs on appeal.

The letter of August 12, 1930, referred to in the opinion, was not the only letter sent through the mails containing the representation that the stores were or would be under the guiding hand of Clarence Saunders. This same representation is found in the letter of July 16, 1929, Exhibit 45 (275)*. This letter was written nine months before the indictment letter and at an early stage in the stock selling scheme. What this Court said on page 3 of its opinion in this case, in reference to the letter of August 12, 1930, would not apply to the letter of July 16, 1929. The same representation is found in Exhibit 63 (296), dated August 12, 1930, and in Exhibit 75 (307), dated July 10, 1929. In fact this attempt on the part of appellants to induce the victims of their scheme to believe that Clarence Saunders had and would have a large part in the management of the grocery business runs all through the letters and literature sent out by appellants, from the inception to the close of the stock selling operations.

We particularly invite the Court's attention to the statement contained in some of the exhibits in evidence. In Exhibit 48 (276), dated November 26, 1929, the stores are referred to as the "Arizona Stores". This exhibit alone would probably not be sufficient to show a plan to mislead the purchasers but, when taken into consideration with all the other letters, it fits into the picture and shows a deliberate attempt to make the victims believe that they were buying into a nationwide concern under the personal leadership of Clarence Saunders. We quote the following from one of the letters (279):

---

* Figures in parentheses refer to transcript, unless otherwise designated.

"The writer has had the pleasure of just returning from Memphis, and judging from the volume of business done by *other units* throughout the country, Arizona is among the real leaders. We are trying to make the *Arizona unit* the largest in the country * * * ". (Italics ours).

Was this not a deliberate attempt on the part of appellants to mislead the one to whom this letter was sent? At least, wasn't the answer to this question one for the jury after considering not only this exhibit, but all of the evidence?

We quote from another exhibit in support of the Government's theory that it was the intent of appellants to induce prospective purchasers to believe that Clarence Saunders was practically in full charge and manager of the Arizona Stores (296):

"The stores *were created by a genius* in this particular line of merchandising. Clarence Saunders, through his wonderful merchandising methods, established the Piggly-Wiggly stores, and when retired had built a business in a few years that was prosperous and known all over the world, and *his new stores* are just as much advanced in modern merchandising as his old stores were over the old style grocery. With Clarence Saunders' guiding hands over the different stores to be established under his name, we can only say one thing and that is, within a few years you will find Clarence Saunders Stores the outstanding food distribution stores in the world." (Italics ours).

We believe that this Court erred in announcing in

its opinion that "it would still be his guidance through the store fixtures and in following the instructions". It was for the jury to say, from all of the evidence, what was the purpose and intent of appellants. A jury would be justified in finding that one does not create a store by granting a license to use his name and a specified kind of fixtures. The jury would have the right to say what construction the ordinary individual would place upon the statement about the creating of the stores by a genius when coupled with a statement in the same communication about Clarence Saunders' guiding hand. In limiting these representations to the license and instructions, we believe this Court has taken from the jury its right to determine intent and purpose.

Finally, the conclusions of the Court that the fixtures and instructions provided for in the license are sufficient to support the representation that the stores were or would be under the guiding hand of Clarence Saunders, were based upon an erroneous premise. The Arizona corporation had no contract with Clarence Saunders personally. The licensor *named in the contract* was a corporation (224-225) and not Clarence Saunders personally, and the licensee named in the franchise was A. E. Sanders, not the Arizona Sanders corporation. There is no evidence that this franchise was ever transferred to the Arizona corporation. The minutes of the meeting of directors of the Arizona corporation (242) show an offer on the part of A. E. Sanders to sell the franchise and an acceptance of this offer by the corporation, but there is no evidence of an actual assignment, nor is there any evidence in the record showing consent by the licensor to an assignment. The only evidence in the record is to the

contrary. We quote from the testimony of L. D. Null:

> "If the franchise was owned by the company, I would say it would have some value, but I couldn't say a substantial value. I don't think the franchise was ever assigned." (385).

A. E. Sanders testified (355):

> "Outside of paying that corporation one-half of one per cent royalty on the gross volume of the business, they had nothing to do with our stores after they were established."
>
> " * * * they didn't send any supervisors out to our stores at all."
>
> "They could do so if they wanted to, as we were supposed to keep clean and sanitary stores."
>
> "Clarence Saunders himself never wrote me a letter until after I broke with him, that is, after we changed our name * * *".

The foregoing clearly shows that there was no foundation whatever for the representations that Clarence Saunders had anything to do with the corporation or the stores. There was ample evidence to present to the jury the question of the absence of Clarence Saunders' guiding hand in the business of selling groceries. We submit also that there was ample evidence to submit to the jury the question of appellants' knowledge that Clarence Saunders had no part in guiding the destinies of the Arizona Stores. We quote from the Court's opinion:

> "It is a fair inference from the proofs of the prosecution that * * * appellants as prospective brokers knew the provisions of the license under which the grocery business was to be conducted."

If they knew its provisions, they also knew its limitations and must have known that the licensor was not Clarence Saunders but a corporation. This knowledge on the part of appellants was sufficient to impart to their representations all of the necessary elements of false and fraudulent representations. The legitimacy of the chain grocery store business or the legality of the organization of the company and the securing of permits do not justify false representations in the sale of securities. Even the belief of A. E. Sanders in the possibilities of the chain store business and his belief that appellants thought the business was going to be a success, would not justify the false representations in the sale of stock.

It was unnecessary for the Government to prove that any one was, in fact, deceived by the misrepresentations of appellants. The success of the scheme to defraud is not a necessary element of the crime. It is not even necessary that any one actually be defrauded.

Schauble v. *United States*, 40 F. (2d) 363.

Linn v. *United States*, 234 Fed. 543.

Stunz v. *United States*, 27 F. (2d) 575.

Foster v. *United States*, 178 Fed. 165.

We have discussed this point at some length because we feel that whatever this Court may say as to the other points upon which the case was reversed, the law on this particular point should be correctly stated.

In the event of a new trial, the opinion of this Court becomes the law of the case and binding upon the Trial Court. We do not believe that the question of the representations in regard to Clarence Saunders should be eliminated from the consideration of the jury at the retrial.

In support of the Government's theory that the issues herein discussed are proper issues for the jury to determine, we cite the following authorities:

Kaplan v. *United States*, 18 F. (2d) 939.

Gewertz v. *United States*, 35 F. (2d) 27.

Hyney v. *United States*, 44 F. (2d) 134.

Robinson v. *United States*, 33 F. (2d) 238, 240 (9th C. C. A.).

Baldwin v. *United States*, 72 F. (2d) 810, 814 (9th C. C. A.).

Cooper v. *Schlesinger*, 111 U. S. 148, 155.

Durland v. *United States*, 161 U. S. 306.

Mansfield v. *United States*, 76 F. (2d) 224, 231.

In the case of *Gewertz* v. *United States*, supra, it was held that omissions of notes from list of liabilities in statements, presented question for jury whether omission was knowingly or wilfully made with fraudulent intent.

In the *Hyney case*, supra, it was held that the intent and knowledge of defendant was a question for the jury. It is true that the defendant in that case was president and principal stockholder in the company but, in the present case, appellants had knowledge of the provisions of the license, that the licensor was a corporation and not Clarence Saunders, and their close connection with the company in the sale of stock afforded them ample means for ascertaining the true situation. The question as to whether they engaged in a stock selling scheme with guilty knowledge, was one for the jury. *Robinson* v. *United States*, supra. We quote from page 240 of that opinion:

> "The testimony was ample to show that he took an active part in the conduct of the business of Cromwell Simon & Co., and whether he so participated with guilty knowledge was a question of fact for the consideration of the jury under the testimony in the case."

We quote from the opinion by Judge Wilbur, in the case of *Baldwin* v. *United States*, supra, wherein the evidence was held sufficient to justify the submission of the case to the jury:

> "Many of the investors to whom the salesmen appellants sold stock were called as witnesses and testified to false representations made to them by

the salesmen, in addition to those contained in the sales kits and which *must have been known by the salesmen to be false or at least which they had no reasonable ground for believing to be true.*" (Italics ours.)

We quote from *Cooper* v. *Schlesinger*, supra, at page 155:

"The jury were properly instructed, that a statement recklessly made, without knowledge of the truth, was a false statement knowingly made, within the settled rule."

We call the Court's attention to the opinion of Judge Brewer, in the case of *Durland* v. *United States*, supra, and particularly to that portion found on pages 313 and 314.

Section 5480 Revised Statutes of the United States (18 U. S. C. 338) has been construed by the Supreme Court as "including everything designed to defraud by representations as to past or present or suggestions and promises as to the future." *United States* v. *Stever*, 222 U. S. 167, 173.

We quote from *Mansfield* v. *United States*, supra:

"He found that the company sustained losses in each of those years, and that the liabilities exceeded the assets from the very beginning. Greater elaboration upon the testimony of these witnesses would only serve to emphasize the controversial nature of the fact question presented. *In its last analysis, it was properly a question of fact for the*

jury whether the financial statements falsely represented the condition of the company to the prospective purchasers of its stock and bonds." (Italics ours).

In the present case, it was properly a question for the jury whether the representations regarding Clarence Saunders' guiding hand falsely represented his connection with the company.

II

There were many false representations in addition to the representations that profits were being earned and dividends properly paid.

The representations in the letter set out in part in the opinion to the effect "our common stock is now being sold at $7.50 per share, this raise being justified by the very satisfactory condition of the company, which has really exceeded our expectations." were false. The condition of the company, operating at a loss, did not justify the raise in the price of stock. Proof of a loss would at least place upon appellants the burden to show by some evidence that, in spite of that loss, the raise was justified. There is no such evidence in the record. The assumption by this Court that these representations might have been true, in rapidly establishing twenty-five new stores and building up trade for them, is based upon representations and statements contained in letters and literature prepared by appellants, without any proof to sustain them. The burden on the prosecution to prove that the statements that the business was prosperous and in a satisfactory condition were false, was met and

sustained by the proof that the business was operating at a loss. This raised a question of fact for the jury.

Mansfield v. *United States*, 76 F. (2d) 224, 231.

Baldwin v. *United States*, 72 F. (2d) 810, 813.

The attention of the Court is directed to the quotation from the *Mansfield case*, supra.

We also quote from the opinion of Judge Wilbur in the *Baldwin case*, supra:

> "The books of the Baldwin Company show that during the stock selling campaign the company was continually losing money but in spite of this the price of the stock was arbitrarily raised from time to time to induce people to buy stock and to induce them to believe, as had been so often falsely stated, that the business of the company was very successful and profitable."

We submit that the opinion in this case is a departure from the principle laid down in the *Baldwin case.*

III

The Court erred in holding that the admission in evidence of the summary of accountant Null was erroneous. The Court's ruling on this point is based upon the assumption that the books in Court, which were made available to appellants and upon which the testimony and summary were based, were not the first permanent records of the company. It is the contention of the Government that appellants made represen-

tations as to the condition of the company and as to the earning of profits which they knew to be false or were made in reckless disregard of the truth.

The books in Court, which were marked for identification, were the books of the company kept in the Phoenix office. There was ample evidence that these books were correct. The representations made by appellants were either based upon these records or they were made without any effort by appellants to ascertain the truth. These books were available to appellants at the time they were conducting the stock selling campaign. Can it be the law that one, with the truth available to him, may make false representations and escape punishment because of deliberate failure to ascertain the truth? There was only one source from which appellants could have determined the condition of the company and the question of profit or loss. That was from the books in the Phoenix office, the same books that were in Court. Had appellants availed themselves of this opportunity and had their representations truly reflected the facts as revealed by these books, they could not have been held criminally liable, even though the books and the representations were not correct. Appellants having made representations not sustained by the only records available to them, and the Government having proven that they made the reppresentations and having shown the truth as revealed by the records, it was then the duty of appellants to justify their representations. However, with or without such evidence on the part of appellants, there would be a question of fact for the jury to determine.

Redmond v. *United States*, 8 F. (2d) 24.

Parker v. *United States*, 203 Fed. 950, 951.

Wilson v. *United States*, 190 Fed. 427, 437.

We wish to call the Court's attention to the entire statement on page 437 of the opinion in the *Wilson case* supra. We quote in part from this opinion:

> "Moreover, a person who makes statements concerning the condition or affairs of a corporation is not in a position to object when the regular books of the corporation are used against him. If he be an officer of the corporation and make such representations he should certainly be bound by the books and if he be a stranger, and make statements without knowledge he cannot complain. We think that the rulings of the trial court upon the documentary evidence were correct."

In speaking of the admission of summaries taken from books, the Court, in the *Redmond case* supra, said:

> "It was a convenient summary of the business of the company for that year, and was made up from records which the witness had requested his bookkeeping force to keep and under his supervision. This was clearly admissible."

IV

There was no refusal by the Court to permit the cross-examination of witness Brandt on the very point on which the decision of this Court says cross-examination should have been permitted. There was no con-

tention on the part of appellants that there was any error in the books, except as to the $5,000 advanced to the Phoenix Packing Company. This question was gone into in detail, both on direct and cross-examination of Brandt (415, 416, 417, 418). When appellants made their avowal, the following colloquy took place between Court and counsel:

> "The COURT: I think the matter of *keeping the books* would be proper cross examination, Mr. Flynn.
>
> Mr. FLYNN: I don't apprehend that we have to separate counsel's avowal.
>
> The COURT: No, that is true.
>
> Mr. FLYNN: We are objecting to the entire avowal.
>
> The COURT: There is probably something in the avowal which is pertinent. I think there are other matters that are not. * * *" (427, 428).

Appellants were given an opportunity to cross-examine on the matter of keeping the books. Their attention was called to the fact that their avowal contained objectionable matter, as well as some that was not objectionable. In spite of this fact, they made no effort to cross-examine further on the book entries, for the very obvious reason that they had already covered on cross-examination the only entries in the books, the correctness of which were questioned. If they had any contradictory statements made by the witness,

the way was open to them and there was no ruling by the Court prohibiting further proper cross-examination.

We earnestly request a careful consideration by the Court of the record, in order that, in the event of a retrial, the same may be conducted in accordance with the well-established rules of evidence. We cannot comprehend how appellants can complain of being restricted in their cross-examination when the records fail to disclose a single question propounded to Brandt to which there was an objection made.

V

The Government contends that the record in this case clearly establishes the fact that appellants made false representations as to the guiding hand of Clarence Saunders, the condition of the company, the earning of profits and the payment of dividends. The evidence on these points is uncontradicted. Therefore, the admission in evidence of the income tax records does not constitute reversible error. When a verdict of a jury is supported by uncontradicted competent evidence, the admission of cumulative evidence, even if improperly received, would not justify a reversal of the case.

Arnold v. *United States*, 7 F. (2d) 867, 870 (Syl. 9).

Marron v. *United States*, 18 F. (2d) 218 (9th C. C. A.) (and authorities therein cited).

Stewart v. *United States*, 211 Fed. 41 (9th C. C. A.).

Cook v. *United States*, 159 Fed. 919.

Harrod v. *United States*, 29 F. (2d) 454.

Irving v. *United States*, 53 F. (2d) 55 (9th C. C. A.).

Bonnoyer v. *United States*, 63 F. (2d) 93.

Lewis v. *United States*, 38 F. (2d) 406 (9th C. C. A.).

Bilodeau v. *United States*, 14 F. (2d) 582 (9th C. C. A.).

United States v. *Brown*, 79 F. (2d) 321.

CONCLUSION

In submitting this petition for a rehearing, we have not attempted to exhaust the authorities on the questions raised by the petition. We have only endeavored to stress some of the phases of the case not sufficiently covered in our briefs on appeal and to point out to the Court that justice requires that we be given the opportunity to assist this Court in arriving at the correct solution. The importance of this case, as well as the importance of the legal questions involved, justify further consideration.

We earnestly and respectfully ask that a rehearing

be granted to correct the errors in the Court's decision.

Dated at Phoenix, Arizona, November 21, 1935.

Respectfully submitted,

F. E. FLYNN,
United States Attorney,

C. A. EDWARDS,
Assistant United States Attorney,

Attorneys for Appellee.

The undersigned hereby certify that in their judgment, and each of the undersigned hereby certifies that in his judgment, the foregoing petition for a rehearing is well founded and meritorious and that it is not interposed for delay.

Dated at Phoenix, Arizona, this 21st day of November, 1935.

F. E. FLYNN,
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